

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY J. STEWART,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

:

:

Case No. 3:04cv366
3:99cr079

:

JUDGE WALTER HERBERT RICE

:

DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE (DOC. #41) ON PLAINTIFF-MOVANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE (DOC. #40); SAID MOTION DENIED; PLAINTIFF-MOVANT'S OBJECTIONS TO SAID JUDICIAL FILING (DOC. #42) OVERRULED; CERTIFICATE OF APPEALABILITY AND ANTICIPATED REQUEST FOR LEAVE TO APPEAL *IN FORMA PAUPRIS* DENIED; DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE (DOC. #44) ON PLAINTIFF-MOVANT'S REQUEST TO AMEND MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE (DOC. #43); MOTION TO AMEND OVERRULED; TERMINATION ENTRY

Based upon the reasoning and citations of authority set forth in the Report and Recommendations of the United States Magistrate Judge (Doc. #41), recommending that the Plaintiff-Movant's Motion to Vacate, Set Aside or Correct Sentence (Doc. #40) be overruled on the grounds of the statute of limitations, as well as upon a thorough *de novo* review of this Court's file and the applicable law,

this Court adopts the aforesaid Report and Recommendations in their entirety. The aforesaid Motion to Vacate, etc., is denied, based upon the bar of the applicable statute of limitations. Plaintiff-Movant's Objections to said judicial filing (Doc. #42) are overruled. Given that reasonable jurists would not disagree with this Court's conclusion, this Court denies Plaintiff-Movant a Certificate of Appealability and, further, given that any appeal from this Court's decision would be objectively frivolous, this Court would deny Plaintiff-Movant's request to appeal *in forma pauperis*.

Based upon the reasoning and citations of authority set forth in the Report and Recommendations of the United States Magistrate Judge (Doc. #44), recommending the denial of Plaintiff-Movant's Motion to Amend his Motion to Vacate, etc., as well as upon a thorough *de novo* review of this Court's file and the applicable law, said Report and Recommendations/Order denying Motion to Amend (Doc. #44) is adopted/upheld in its entirety. Even assuming, *arguendo*, that Plaintiff's Motion to Vacate, etc., was not barred by the applicable one-year statute of limitations, Booker is not applicable to cases on collateral review, such as a Motion to Vacate, etc. Humphress v. United States, 398 F.3d 855 (6th Cir. 2005). Accordingly, said requested amendment would be futile. Again, reasonable jurists would not disagree with this Court's conclusion, this Court denies Plaintiff-Movant a Certificate of Appealability and, further, given that any appeal from this Court's decision would be objectively frivolous, this Court would deny Plaintiff-Movant's request to appeal *in forma pauperis*.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

/s/ Walter Herbert Rice

September 26, 2005

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

Copies to:

Timothy J. Stewart, *Pro Se*
#87894-024
U. S. Penitentiary
P. O. Box 1000
Leavenworth, KS 66048
United States Attorney, Dayton
United States Marshal
United States Pretrial Services
Larry England U. S. Probation Officer

WHR/slc